STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. BICKLER and MARCIE BICKLER,

Plaintiffs-Appellees,

v

CITY OF TRAVERSE CITY,

Defendant-Appellant.

UNPUBLISHED
June 29, 2004

No. 248318
Grand Traverse Circuit Court
LC No. 02-022158-NZ

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

O'CONNELL, J. (*dissenting*).

Plaintiffs' home was flooded, and their cause of action accrued, before the Legislature passed a statutory scheme that replaced the viable common-law cause of action for tort-nuisance with a statutory remedy. MCL 691.1417. The new scheme required an immediate reaction from prospective litigants, leaving them only forty-five days to inform the responsible agency of the flooding problem in writing. MCL 691.1419. Less than four months later, our Supreme Court backed up the Legislature's amendment by judicially abolishing the tort-nuisance cause of action against agencies other than the state, but it also expressed reluctance to eliminate causes of action that arose before its decision. *Pohutski v City of Allen Park*, 465 Mich 675, 699; 641 NW2d 219 (2002). After carefully weighing the alternatives, it decreed that its decision and the statute would only apply prospectively. *Id*. at 697-698. It held that a contrary conclusion would unjustly create "a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Id.* At 699.

Despite admonishing language in *Pohutski, supra*, the majority remains determined to create a "class of litigants" who, despite suffering otherwise rectifiable wrongs, are held to have no cause of action "because of an unfortunate circumstance of timing." This case involves a pair of litigants potentially divested of their cause of action due to the same unfortunate timing decried in *Pohutski*. Although the flooding occurred before the statute took effect, plaintiffs, undoubtedly confident that their judicial remedies remained intact, did not file their complaint until after the expiration of the statute's forty-five day limit and after the Supreme Court released *Pohutski*. Now the majority holds that *Pohutski* bars any judicial relief, notwithstanding the fact that plaintiffs could not have known that the court would drastically alter the state of the law before they filed and after their statutory remedies had potentially disintegrated. Because this presents a situation that the Supreme Court expressly sought to avoid, *id*. at 698-699, I would hold that the Supreme Court preserved trespass-nuisance causes of action that accrued before the statute effectively displaced the common-law tort. *Id*. at 697-698. This conclusion comports

with the Supreme Court's declaration that these two new modifications to established law would apply only prospectively. *Id.* Accordingly, I would affirm.

/s/ Peter D. O'Connell